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In The

Supreme Court of the United States

OCTOBER TERM, 1963

No. 894

L. B. VANCE and FORD VANCE, Partners doing business as VANCE DAIRY,

Petitioners,

—*v.*—

ORVILLE FREEMAN, Secretary of Agriculture of the United States of America,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS WITH APPENDIX

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ARGUMENT

1. On January 28, 1964, the Secretary published in the Federal Register (29 FR 1403, at 1407), a recommended decision on the order area involved herein, i.e. Central Mississippi Federal Milk Marketing area, which should be brought to the court's attention. This is a public record, issued by the Secretary of Agriculture and is material to the arguments raised in the Brief of the Solicitor General at pages 6-7.

In this recommended decision the Secretary completely reversed the position which he took in the 1957 Amendment, here contested. The Secretary now recommends that Vance Brothers and others similarly situated be allowed to buy unlimited amounts of needed supplemental milk without any loss of exemption, or the incurrence of large

assessments on his home-farm milk. Pertinent language is abstracted in Appendix "A".

This recommended decision is not final, and on the Secretary's theory could be reversed tomorrow, and if made final could be abandoned and reversed at any time thereafter. Yet the issuance of this recommended decision we submit is the best proof that the Solicitor-General's argument at pages 6 and 7 of the Respondent's brief that an exemption of Vance Brothers and others similarly situated "might" adversely affect the regulatory scheme is not of actual practical significance, since the Secretary now finds no adverse affect from allowing Vance Brothers to buy supplemental milk from regulated plants, whereas before he would not allow the purchase of so much as one pint of milk from a regulated handler.

This recommended decision for Central Mississippi is similar to a recommended decision issued on November 6, 1962, (27 FR 10795, at 10797), in the Southern Michigan marketing area, in which the Secretary himself again rejected one of the reasons which he advances to the court at pages 6-7, and asserted the restricting of purchases from pool plants tended to unduly increase surplus milk production by the farmer-distributor, and was not efficient. Pertinent excerpts of this recommended decision are attached hereto as Appendix "B".

In actual fact a holding by this court granting relief to Vance Brothers will require no adjustments whatever in the present treatment of the farmer-distributor who sells only the milk of his own production, since the Secretary already exempts such a person from the regulatory provisions in every Federal milk order area, and will require no adjustments whatever in 68 milk orders, where needed supplemental milk may be bought without penalty (See Appendix K page 121a-124a in Appendix to Petition.)

A grant of the relief sought herein would in practical effect return to the type of exemption the Secretary followed for 20 years prior to 1957, when he complied with the intent of Congress and in all markets exempted the milk produced, processed and distributed by a farmer, from regulatory payments, whether he bought supplemental milk from a regulated handler or not.

The Secretary now deems "frivolous", and plainly regard as unnecessary, any evidentiary basis for, or explanation of, the patently inconsistent results reached by him, and seeks to rely upon arguments which he can use either way, rather than evidence and findings of fact.

If such is to be the level of the Secretary's legal responsibility, it is plain that the Congressional requirements that hearings be held, evidence taken and findings based on evidence and decisions issued, together with a full explanation, will be set at naught and the Secretary will be able to reach utterly inconsistent results in similar circumstances at his will.

This is an issue which transcends the present case and involves the nature and type of a hearing and findings which the Secretary is required to hold and make, and raises an issue in which all regulated persons and the public in general have an interest.

2. It is in part the position of the Petitioners that Congress failed to include the Petitioners within the regulated class; that the lower court decisions cited in the brief of Respondent at page 7 proceed from an extension of the language of the Supreme Court in *United States* v. *Rock Royal Co-Operative, Inc.*, (307 U. S. 533, 580), and that this language has been misread by the lower court. Only the Supreme Court can finally determine the meaning of its opinions, *and this court has not yet held that milk in a cow's udder was purchased by the farmer who milks her.*

The lower courts' construction renders the word "purchase" the equivalent of handle or handlers. Since these latter words were already in the previous Act of 1933, the addition of the word "purchase" would have been unnecessary and superfluous.

The Act when read in its entirety makes it plain that "purchase" was not to be superfluous.

For example, the Act authorizes only the "fixing of prices" to be paid by "all handlers for milk purchased from producers," (8c(5)(A)), and provides for "payment" (8c(5)(B)(i), (ii). The jurisdictional clause uses the words "after purchase" in their normal commercial sense and couples it with "sale" (8c(10)(j)). The word "purchase" was inserted in one section by Amendment of the Senate and agreed to by the House of Conference.[1/]

The committee reports indicdate the word "purchase" was taken from two Supreme Court cases, involving actual purchases, i.e. *Lempke* v. *Farmers Grain*, (258 U. S. 50), and *Baldwin* v. *Seelig*, (55 Sup. Ct. Rept. 497).[2/]

In view of the foregoing the word "purchase" was not intended to be superfluous and should not be so construed.

It is significant also that the Act forbids the regulation of a producer as a producer, and restricts the Secretary to specific terms in the orders, "and no others" (8c(5)(A)), without any express reference to the authority to regulate farmer-distributors, or to regulate them as they are regulated in the contested order. It is significant also that the committee reports state that:

"The orders can be made applicable only to specified commodities and *can contain only such terms and con-*

[1/]See Conference Report number 1757, Aug. 12, 1935, Senate Amendment number 21.

[2/]House of Agriculture Committee Report number 1241, June 15, 1935, on HR 8492, at page 10.

ditions as are expressly authorized in the proposed amendment. Furthermore the amendment contain *provisions intended to safeguard the exercise of and prevent abuses in the application of the regulatory power* conferred on the Secretary."[3]/

It is also significant that the Lehigh Valley decision (370 U. S. 76) recognized that the pool is for "bought" milk, (See page 81).

In short we respectfully submit the exemption emanates from Congress.

3. All other points raised in the petition are urged again, but not referred to herein, since they were not discussed in the brief in opposition, or as in the case of the trade barrier issue, the defense was answered in the petition.

Respectfully submitted,

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[3]/Senate Report number 1011, 74th Congress First Session on HR 8492, July 3, 1935. (See also House of Agricultural Committee Report 1241, 74th Congress First Session page 7, where the above language is coupled with "specific exemption of producers" from the Secretary's power).

APPENDIX A

"The definition of a 'producer-handler' should be modified from that contained in either the present Central Mississippi or Mississippi Gulf Coast orders."

"*Producer-handlers* usually operate small businesses, handling essentially only Class I milk and relying primarily on their own farm production as a source of supply. Such individuals *assume the risks of production as well as the risks of processing and distribution. Under such circumstances it is not necessary to subject them to regulation* other than reporting to attain the purposes of the Act."

"*The incentive to attempt to masquerade as a producer-handler can be substantially alleviated by permitting purchases of Class I milk from pool plants.* Since producers do not otherwise share in the Class I sales of producer-handlers and *it is the nature of a producer-handler business that supplemental purchases would be needed for Class I use*, it is appropriate that any purchases made from the pool by a producer-handler carry a Class I classification." (Emphasis supplied).

29 FR 1403, 1407

APPENDIX B

"The reliance of producer-handlers on supplemental milk from pool plants ranges from between about 2 to 50 percent of their total receipts, with the latter percentage being more nearly representative of the group. Thus, the proposal would result in the pooling of own-farm production of most producer-handlers and would provide an incentive for such operators to increase own-farm production significantly in order to maintain exempt status. *To provide such encouragement for increased milk production in a market already adequately supplied might interfere with the efficient use of agricultural resources.*

"There is no contention that producer-handlers are not paying the Class I price for milk purchased from pool plants. It was contended, however, that producer-handlers' costs for milk are lower than that for regulated handlers because all of them do not pay the premiums over Class I prices that many other handlers in the market pay. *Insofar as order prices are concerned, such costs are uniform.* It would be inappropriate to amend the order as proposed in order to eliminate the marketing situation complained of." (Emphasis supplied).

27 FR 10795, 10797